

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUB-TITLE 7. WATER RESOURCES

CHAPTER 167

RULES OF PRACTICE AND PROCEDURE
FOR THE COMMISSION ON WATER RESOURCE MANAGEMENT

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Subchapter 1

General Provisions

§13-167-1 Purpose. This chapter governs practice and procedure before the commission on water resource management of the state under chapter 91, Hawaii Revised Statutes, the Constitution and water laws of the state, the Constitution and laws of the United States, and such other related acts as may now or hereinafter be administered by the commission. These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-2 Definitions. (a) As used in this title, unless the context requires otherwise:

"Authorized planned use" means the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals.

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the commission on water resource management.

"Change in use" means any modification or change in water use from or to domestic, municipal, military, agriculture (including agricultural processing), or industrial use.

"Commission" means commission on water resource management.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.

"Department" means the department of land and natural resources.

"Deputy" means the deputy to the chairperson of the commission on water resource management.

"Ground water" means any water found beneath the surface of the earth, whether or not in perched, dike- confined, or basal supply; in underground channels or streams; standing, percolating, or flowing condition; or under artesian pressure.

"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of aquatic life and wildlife habitats;

- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;
- (7) Maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

"Nonregulated use" means any use of water which is exempted from regulation by the provisions of this code.

"Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any court or agency proceeding.

"Person" means any individual, firm, association, organization, partnership, estate, trust, corporation, company, or any governmental unit.

"Petitioner" means the person or agency on whose behalf the petition or application is made.

"Presiding officer" means the person conducting the hearing which shall be the chairperson or the chairperson's designated representative.

"Proceeding" means the commission's consideration of the relevant facts and applicable law, and action thereupon with respect to a particular subject within the commission's jurisdiction, initiated by a filing or submittal or request or a commission's notice or order, and shall include but not be limited to:

- (1) Petitions or applications for the granting or declaring any right, privilege, authority, or relief under or from any provision of law or of any rule or requirement made pursuant to a power granted by law;
- (2) An investigation or review instituted or requested to be instituted by the commission;
- (3) Other proceedings involving the adoption, amendment, or repeal of any rule of the commission, whether initiated by commission order or notice or by petition of an interested person.

"Public hearing" means a hearing required by law in which members of the public generally may comment upon a proposed rule or application.

"Public records" is defined in section 92-50, Hawaii Revised Statutes. The term shall include all rules, written statements of policy or interpretation formulated, adopted or

used by the commission, all final opinions and orders, the minutes of meetings of the commission and any other material required by law to be kept on file in the office of the commission unless accorded confidential treatment pursuant to statute or the rules of the commission.

"Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

"Rules" means the rules of practice and procedure before the commission.

"Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some parts of the bed or channel have been dredged or improved does not prevent the watercourse from being a stream.

"Surface water" means both contained surface water (that is, water upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other watercourse, lakes, and reservoirs) and diffused surface water (that is, water occurring upon the surface of the ground other than in contained waterbodies). Water from natural springs is surface water when it exits from the spring onto the earth's surface.

"Sustainable yield" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission.

"Water" or "waters of the state" means any and all water on or beneath surface of the ground, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground.

"Water management area" means a geographic area which has been designated pursuant to chapter 13-171 as requiring management of the ground or surface water resource, or both.

"Water source" means a place within or from which water is or may be developed, including but not limited to: (1) generally, an area such as a watershed defined by topographic boundaries, or a definitive ground water body; and (2) specifically, a particular stream, other surface water body, spring, tunnel, or well or related combination thereof. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-2, 174C-3)

§13-167-3 General powers and duties. The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

- (1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality.
- (2) Shall designate water management areas for regulation under chapter 13-171, where the commission, after the research and investigations mentioned in paragraph (1), has consulted with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water.
- (3) May designate water management areas without the need to conduct scientific investigation or research in any area in which serious disputes respecting the use of ground or surface water resources are occurring.
- (4) May take jurisdiction of and resolve any disputes regarding water resource protection, water permits, or constitutionally protected water interests or where there is insufficient water to meet competing needs, whether or not the area involved has been designated a water management area.
- (5) May conduct hearings, issue declaratory or adjudicatory rulings and orders, fashion conditions, limitations, and remedies, and otherwise exercise such other powers as may be necessary and proper in aid of its jurisdiction consistent with law.
- (6) May issue water use permits with conditions and limitations as may be necessary for the fair and rational management of Hawaii's water resources including but not limited to permits allowing uses of water, the common law of the state to the contrary notwithstanding.
- (7) May declare water shortages and exercise the reasonable powers including the issuance of orders or the imposition of conditions or limitations necessary to protect the public health, safety, and welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses.
- (8) Shall establish an instream use protection program designed to protect, enhance, and reestablish,

where practicable, beneficial instream uses of water in the state.

- (9) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons.
- (10) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting investigations and studies, or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry.
- (11) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the state, and assist such organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with such organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts.
- (12) Shall prepare, publish, and issue such printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities.
- (13) May appoint and remove agents and employees including hearing officers, specialists, and consultants necessary to carry out the purposes of this chapter without regard to the requirements of chapters 76 and 77 and section 78-1, HRS.
- (14) May acquire, lease, and dispose of such real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in 13-167-33.
- (15) Shall identify, by continuing study, those areas of the state where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public.
- (16) Shall provide such coordination, cooperation, or approval necessary for the effectuation of any plan or project of the federal government in connection

with or concerning the waters of the state. The commission shall approve or disapprove such federal plans or projects on behalf of the state. No other agency or department of the state shall assume the duties delegated to the commission under this paragraph, except that the department of health shall continue to exercise such powers vested in it with respect to water quality, and except that the department of business and economic development shall continue to carry out its duties and responsibilities under chapter 205A, HRS.

- (17) Plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water.

- (18) Shall catalog and maintain an inventory of all water uses and water resources.

[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-2, 174C-5, 174C-7, 174C-43)

§13-167-4 Office. The principal office of the commission is at the Kalanimoku building, 1151 Punchbowl St., Honolulu, Hawaii. All communications to the commission shall be addressed to the commission on water resource management, 1151 Punchbowl Street, Honolulu, Hawaii, 96813 unless otherwise specifically directed. The offices of the commission shall be open from 7:45 a.m. to 4:30 p.m. Monday through Friday unless otherwise provided by law or order.
[Eff. MAY 27, 1988] (Auth: HRS §80-1, 91-2) (Imp: HRS §91-2)

§13-167-5 Meetings. (a) The commission may meet and shall exercise its powers throughout the entire State of Hawaii.

(b) Regular meetings of the commission shall be held in Honolulu, each and every month at a time and place established by the commission. Notice shall be given in accordance with chapter 92, HRS.

(c) Special meetings may be convened by the chairperson of the commission at any time by giving notice at least five days prior to the date of the meeting to each member present in the state and by posting a public notice at the office of

the department of land and natural resources, provided, however, that in the case of emergencies, meetings shall be conducted in accordance with HRS §92-8.

(d) All meetings of the commission shall be open to the public; provided, that the commission may meet in executive session, as provided in chapter 92, HRS, from which the public may be excluded, by a recorded vote of two-thirds of the members present. No order, ruling, contract, appointment, or decision shall be finally acted upon at the executive session. [Eff. MAY 27, 1988]

(Auth: HRS §174C-8) (Imp: HRS §§174C-9, 92-3, 92-4)

§13-167-6 Quorum. Four members of the commission shall constitute a quorum to transact business and the concurrence of a simple majority of the members of the commission shall be necessary to approve any action of the commission. [Eff. MAY 27, 1988] (Auth: HRS §92- 15) (Imp: HRS §§92-15, 174C-9)

§13-167-7 Chairperson. (a) The chairperson shall, in addition to any other duties, have charge of the commission's official records and shall be responsible for the maintenance and custody of the files and records of the commission, including the transcripts of testimony and exhibits, with all papers and requests filed in proceedings, the minutes of all action taken by the commission and all its findings, determinations, reports, opinions, orders, rules, and approved forms.

(b) The chairperson shall also prepare for submission by the commission an annual report of the commission's activities, accomplishments, and recommendations to the governor and to the legislature through the governor.

(c) All orders and other actions of the commission shall be authenticated or signed by the chairperson or other persons authorized by the commission. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §174C-5 and §174C-7)

§13-167-8 Deputy to the chairperson. (a) There shall be a first deputy to the chairperson of the commission for water resource management who shall be in addition to any first deputy to the chairperson of the board of land and natural resources. The deputy shall have experience in the area of water resources and shall be appointed by the chairperson with the approval of a majority of the commission.

(b) The duties of the deputy for water resource management shall be to administer and implement, under the

direction of the commission, the state water code and all rules, and other directives promulgated in accordance therewith by the commission. Nothing in this provision shall be construed as limiting the authority of the commission as to matters regarding water resources.

(c) The deputy shall serve as the administrative head of the commission staff and shall have responsibilities and duties as may be prescribed by the commission.

(d) The deputy shall prepare a hearing calendar and the agenda for all meetings, under the direction of the chairperson.

(e) The deputy shall certify all decisions and orders and other actions of the commission.

(f) All requests for public information, copies of public records, or to inspect the public records of the commission, shall be directed to the deputy either in writing or in person.

(g) The deputy shall prepare for the commission the draft of an annual report of the commission's activities, accomplishments, and recommendations for submission to the governor and to the legislature through the governor.

(h) The position of deputy for water resource management is not subject to chapters 76 and 77, HRS. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-2, 174C-6)

§13-167-9 Public records. (a) All public records shall be available for inspection in the office of the commission, Honolulu, Hawaii, during established office hours unless such inspection of these records is contrary to any state or federal law. Where the records are open under any rule of court, the attorney general may determine which records may be withheld from public inspection when the records: (1) pertain to the preparation of the prosecution or defense of any action or proceeding to which the state is or may be a party; or (2) are necessary for the protection of the character or reputation of any person.

(b) Photocopies of public records, certified copies of extracts from public records, or public records printed or reproduced by the commission in quantity shall be given to any person requesting the same by paying the fees established by the commission or by law.

(c) Requests for public information, for permission to inspect official records, or for copies of public records shall be processed by public officials with due regard for the dispatch of other public duties. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-2, 92-21, 92-21)

§13-167-10 Penalties. (a) The commission may enforce its rules and orders adopted pursuant to this title by suit for injunction or for damages or both.

(b) Any person who violates any provision of this title or any permit condition or limitation established pursuant to this title or who negligently or willfully fails to or refuses to comply with any final order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day during which the offense is committed is a separate violation.

(c) No provision of this chapter shall bar the right of any injured person to seek other legal or equitable relief against a violator of this chapter. [Eff. MAY 27, 1988]
(Auth: HRS §174C-8) (Imp: HRS §174C-15)

§13-167-11 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, this invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §174C-16)

Subchapter 2

Proceedings Before the Commission

§13-167-21 Appearance and practice before the commission. (a) A person may appear on his/her own behalf. A partner may represent the partnership. A bona fide officer or employee of a corporation, trust, or association may represent the corporation, trust, or association. An officer or employee of an agency may represent the agency in any proceeding before the commission.

(b) Any person, partnership, corporation, trust, or association may be represented by or with counsel or other duly qualified representatives in any proceeding under these rules.

(c) When a person acting in a representative capacity appears in person or signs any document or other papers in

practice before the commission, the person shall show the authority to act in that capacity.

(d) No person who has been associated with the commission as a member, officer, employee, or counsel shall be permitted at any time to appear before the commission in behalf of or to represent in any manner, any party in connection with any proceeding or matter which the person has handled or passed upon while associated in any capacity with the commission.

(e) No person who has been associated with the commission as a member, officer, employee, or counsel thereof shall be permitted to appear before the commission in behalf of, or to represent in any manner, any person in connection with any proceeding or matter which was pending before the commission at the time of the person's association with the commission unless the person shall first have obtained the written consent of the commission verifying that the person did not give personal consideration to the matter or proceeding in which the consent is sought or gain particular knowledge of the facts thereof during the person's association with the commission. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-22 Proceedings before the commission. (a) All proceedings before the commission concerning the enforcement or application of any provision of this chapter or any rule adopted pursuant thereto, or the issuance, modification, or revocation of any permit or license under this code by the commission, shall be conducted in accordance with chapter 91, HRS. Hearings regarding particular water resources shall be conducted on the island where those water resources are located.

(b) The commission may on its own motion or on petition or application of any interested person or persons or an agency of the state or county government hold proceedings as necessary from time to time for the purpose of: (1) obtaining information necessary or helpful in the determination of its policies or actions; (2) formulating its rules; (3) carrying out its duties and responsibilities including the designation of water management areas, the permitting of water uses, and the enforcement of rules, orders and legal standards and obligations.

(c) For the purposes permitted by law, the commission may subpoena witnesses and require the production of any document, record, chart, photograph, recording, notes, compilation of information, or any other evidence or form of evidence recognized by law.

(d) The commission shall follow procedures that, in its opinion, best serve the purposes of the proceedings, unless specifically prescribed in these rules, chapter 91, Hawaii Revised Statutes, or by law.

(e) Any rule in this chapter may reasonably be suspended or waived by a majority of the commission to prevent undue hardship in any particular instance upon a showing of good cause, provided that the Commission shall explain in writing the reasons for its action.

(f) Proceedings shall be commenced by order of the commission upon its own motion, or by the filing of a petition or application. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-2, 92-16, 174C-9)

§13-167-23 Dispute resolution. (a) The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally or otherwise legally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this title. The final decision on any matter shall be made by the commission.

(b) Pursuant to its authority to resolve disputes regarding water, the commission may accept for consideration and decision:

(1) cases or controversies referred to it by a court;
or

(2) questions certified to it by a court.

(c) To resolve disputes properly before it, the commission shall have all the powers necessary and proper to effectuate its decisions and orders and grant relief consistent with law.

(d) In order to facilitate dispute resolutions, the commission may employ the use of special hearing officers or special masters for the purposes of mediation, fact finding, and/or arbitration. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§92-17, 174C-10, 174C-11)

§13-167-24 Hearings officers. (a) The chairperson may appoint hearings officers, not subject to chapters 76 and 77, HRS, to conduct public hearings and/or to hear and reach a preliminary decision on any matter concerning the implementation or administration of the state water code which the commission may refer to the hearings officers by rule or otherwise.

(b) In assigning matters to hearings officers, the chairperson shall make the assignments in a manner which ensures that hearings officers will develop familiarity and expertise with given geographic areas.

(c) In conducting a hearing on any matter referred by the commission, a hearings officer shall solicit and consider the views of the appropriate county officials responsible for planning, economic development, and resource management and such other county officials and others as the commission shall direct. Any affected county agency shall be admitted as a party upon request.

(d) Each hearings officer is deemed to be an agent of the commission with all powers associated with such designation.

(e) The commission shall adjudicate disputes where there is insufficient water to meet competing needs.
[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§92-16, 174C-11)

§13-167-25 Filing of documents. (a) All pleadings, applications, submittals, petitions, reports, maps, exceptions, briefs, memoranda, and other papers required to be filed with the commission in any proceeding shall be filed with the chairperson. These papers may be sent by mail or hand-carried to the commission office in Honolulu, Hawaii, within the time limit, if any, for filing. The date on which the papers are actually received by the office of the chairperson shall be deemed to be the date of filing.

(b) All papers shall be written, typewritten, or printed and signed in ink by the party or the party's authorized agent or attorney. The individual's name in block or typed letters shall appear beneath all signatures. An individual's signature on a document shall constitute a certification that the person has read the document, that to the best of that person's knowledge, information, and belief every statement contained in the document is true and no statements are misleading, and that it is not interposed for delay.

(c) Unless otherwise specifically provided by a particular rule or order of the commission, an original and three copies of all papers shall be filed. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-26 Continuances, extensions, and computation of time. Whenever a person or agency has a right or is required to take action within the period prescribed or allowed by

these rules, by notice given thereunder or by an order, the commission or its chairperson may, for good cause and if permitted by law:

- (1) Before the expiration of the prescribed period, with or without notice, extend the period; or
- (2) Upon application, permit the act to be done after the expiration of a specified period.

Time shall be computed in accordance with HRS §1-29.

[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§1-29, 91-2)

§13-167-27 Documents. If any document filed with the commission is not in substantial conformity with rules of the commission as to the contents thereof, or which is otherwise insufficient, the commission may refuse to accept the document, or may require its amendment. All documents filed with or presented to the commission may be retained in the files of the commission. The commission may permit the withdrawal of original documents upon submission of properly authenticated copies to replace the documents. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-28 Service of Decision and Notice of Rules. All final decisions, orders, opinions, or rulings entered by the commission in a proceeding shall be served upon the parties or persons participating in the proceeding by regular mail or personal delivery by the commission and may be released for general publication. All rules and written policies promulgated by the commission as well as copies of the published materials shall be available for public inspection in the offices of the commission or may be obtained upon request and upon payment of the appropriate fee, if any. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-29 Counsel for the commission. (a) The attorney general or representative of the attorney general's office shall be counsel to the commission and shall advise and represent the commission in all legal matters. The attorney general's representative shall attend the meetings and proceedings of the commission and shall be served with copies of all papers, pleadings, maps, documents and other papers in any proceeding.

(b) In the event any state agency appears before the commission as an applicant or in an adjudicatory posture or proceeding, that agency shall utilize legal counsel

independent of the commission's attorney. [Eff. MAY 27, 1988]
(Auth: HRS §174C-8) (Imp: HRS §§28-4, 91-2)

§13-167-30 Substitution of parties. Upon motion and for good cause shown, the commission may permit the substitution of parties; provided that in case of the death of a party, substitution may be permitted without filing of a motion. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-31 Consolidations. The commission, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-32 Judicial review and appeal. Judicial review of rules and orders of the commission under this chapter shall be governed by chapter 91, HRS. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-14, 91-15, 174C-12)

§13-167-33 Acquisition of real property. (a) The commission may acquire real property as provided in HRS 174C-14 or it may request the board of land and natural resources on behalf of the commission to acquire, regulate or manage property under HRS chapters 171, 173, 173A, 174, 174C, 175, 179, 180, and 180C.

(b) The commission or the board of land and natural resources on the commission's behalf may acquire real property and easements by purchase, gift, devise, lease, eminent domain, or otherwise for flood control, water management, or water and water-related resource conservation.

(c) Land, water areas, and related resources which may be acquired for this purpose include, but are not limited to, streams and other watercourses, parks and recreation areas, beaches, submerged lands, and other open areas, as well as necessary access sites and rights-of-way.

(d) This section does not limit the exercise of similar powers delegated by statute to any state or local government agency. This section is not intended to limit, in any way, the powers of the commission in regards to the acquisition of

real property under any other statute. [Eff. MAY 27, 1988]
(Auth: HRS §174C-8) (Imp: HRS §§171-30, 174C-14)

Subchapter 3

Rulemaking Proceedings

§13-167-41 Initiating proceedings. Pursuant to petition, or upon its own motion, the commission shall hold a public hearing as provided by law whenever it proposes to issue, amend, or repeal a rule. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-3, 91-6)

§13-167-42 Notice of hearing. (a) Notice of proposed rulemaking shall be published at least once in a newspaper of general circulation in the state and in each county affected by the proposed rule. All notices shall be issued at least twenty days prior to the date set for public hearing.

(b) A notice of the proposed issuance, amendment, or repeal of a rule shall include:

- (1) A statement of the date, time, and place where the public hearing shall be held;
- (2) Reference to the authority under which the issuance, amendment, or repeal of a rule is proposed;
- (3) A statement of the substance of the proposed rulemaking; and
- (4) In the case of a proposal to establish, change, or review hydrologic unit boundaries, in addition to the foregoing, a statement of the time and place where maps showing the proposed or existing boundaries within the county may be inspected prior to the public hearing.

(c) In any rulemaking proceeding where the commission deems it necessary, a further notice of proposed rulemaking may be published in a newspaper of general circulation in the state. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-3, 91-6)

§13-167-43 Time and place. Each hearing shall be held at the time and place set in the notice of hearing, but may at that time and place be continued by the presiding officer from day to day or adjourned to a later date or to a different

place without notice other than the announcement thereof at the hearing. Where the proposed rulemaking affects only one county, the public hearing shall be held in that county.
[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-3, 92-16)

§13-167-44 Conduct of rulemaking hearing. (a) Each hearing shall be presided over by the chairperson of the commission or by its designated representative. The hearing shall be conducted in such a way as to afford to interested persons a reasonable opportunity to be heard on matters relevant to the issues involved and to obtain a clear and orderly record. The presiding officer shall have authority to administer oaths or affirmations and to take all other actions necessary to the orderly conduct of the hearing.

(b) At the commencement of the hearing, the presiding officer shall read the pertinent portions of the notice of the hearing and shall then outline briefly the procedure to be followed. Evidence shall then be received with respect to the matters specified in the notice of hearing in the order the presiding officer shall prescribe.

(c) All interested persons shall be given reasonable opportunity to offer evidence with respect to the matters specified in the notice of hearing. Every witness may, before proceeding to testify, be sworn, and may be required thereafter to state the witness' name, address, and whom the witness represents at the hearing, and give any other information respecting the witness' appearance as the presiding officer may request. The presiding officer shall confine the evidence to the questions before the hearing but shall not apply the technical rules of evidence. Every witness shall be subject to questioning by the presiding officer or by any other representative of the commission, but cross-examination by private persons shall not be permitted except if the presiding officer expressly permits it.

(d) All interested persons or agencies of the state or its political subdivisions shall be afforded an opportunity to submit data, views or arguments which are relevant to the issues. In addition, or in lieu thereof, persons or agencies may also file with the commission within fifteen days following the close of public hearing a written protest or other comments or recommendations in support of or in opposition to the proposed rulemaking. Persons designated by the presiding officer shall be furnished with copies of any written protest or other comments or recommendations, and they shall be afforded a reasonable time within which to file their comments in reply to the original protest, comments, or

recommendations. Written protest, comments, or recommendations or replies thereto shall not be accepted unless an original and ten copies (or lesser number of copies as may be specifically agreed to by the presiding officer) are filed. The period for filing written protest, comments, or recommendations may be extended by the presiding officer for good cause.

(f) Unless otherwise specifically ordered by the commission or the presiding officer, testimony given at the hearing need not be reported verbatim. All supporting written statements, maps, charts, tabulations, or similar data offered in evidence at the hearing, and which are deemed by the presiding officer to be authentic and relevant, shall be received in evidence and made a part of the record. Unless the presiding officer finds that the furnishing of the required number of copies impracticable and reduces the number, eleven copies of the exhibits shall be submitted.

(g) At the close of the final public hearing, the commission shall announce the date when its decision shall be announced, or the commission may, if it so desires, make the decision at the public hearing. The commission shall consider all relevant comments and material of record before taking final action in a rulemaking proceeding. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-3, 92-16)

§13-167-45 Emergency rulemaking. Notwithstanding the foregoing rules, if the commission finds that an imminent peril to public health, safety, or morals requires adoption, amendment, or repeal of a rule upon less than twenty days' notice of hearing, and states in writing its reason for the finding, it may proceed without prior notice or hearing, or upon an abbreviated notice and hearing, to adopt an emergency rule to be effective for a period not longer than 120 days without renewal. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-3)

§13-167-46 Petitions for adoption, amendment or repeal of rules. (a) Any interested person or any agency of the state or county government may petition the commission for the issuance, amendment, modification, or repeal of any rule which is designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the commission.

(b) Petitions for rulemaking shall set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired and stating concisely the

nature of the petitioner's interest in the subject matter and the reasons for seeking the issuance, amendment, or repeal of the rule and shall include any facts, views, arguments, and data deemed relevant by petitioner. The commission may require the petitioner to adequately and properly notify persons or governmental agencies known to be interested in the proposed rulemaking of the existence of the filed petition. No request for the issuance, amendment, modification, or repeal of a rule which does not conform to the requirements set forth above shall be considered by the commission.

(c) Petitions for rulemaking shall become matters of public record upon filing. The commission shall within thirty days following the filing of the petition either deny the petition in writing or initiate public rulemaking procedures. No public hearing, oral argument, or other form of proceedings need be held, but if the commission determines that the petition discloses sufficient reasons in support of the relief requested to justify the institution of public rulemaking proceedings, the procedures to be followed shall be as set forth in this subchapter. Where the commission determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be so notified together with the grounds for the denial. The provisions of this section shall not operate to prevent the commission, on its own motion, from acting on any matter disclosed in any petition. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-6, 92-16)

Subchapter 4

Contested Case Proceedings

§13-167-51 Contested case hearing. When required by law, the commission shall hold a contested case hearing upon its own motion or on the written petition of any government agency or any interested person who is properly admitted as a party pursuant to section 13-167-54. Unless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the commission may adopt procedures that in its opinion will best serve the purposes of the hearings. Where required by law, a public hearing shall be held prior to the contested case hearing. [Eff. MAY 27, 1988] (Auth: HRS §91-2, 174C-8) (Imp: HRS §91-9, 174C-60)

§13-167-52 Request for hearing. (a) A hearing on a contested matter may be requested by the commission on its own motion or upon the written petition of any government agency or interested person. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the commission meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the commission not later than ten days after the close of the public hearing or the commission meeting, whichever is applicable. The commission may extend the time for submitting a written petition for an additional ten days if necessary.

(b) A petition requesting a contested case hearing shall contain concise statements of:

- (1) The legal authority under which the proceeding, hearing or action is to be held or made;
- (2) The petitioner's interest that may be affected;
- (3) The disagreement, denial, or grievance which is being contested by the petitioner;
- (4) The basic facts and issues raised;
- (5) The relief to which the party or petitioner seeks or deems itself entitled; and
- (6) The identification of any and all other persons who may or will be affected by the relief which petitioner seeks.

[Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8)

(Imp: HRS §91-9)

§13-167-53 Notice of hearing. After a determination is made that a contested case hearing is required, the written notice of hearing shall be served on parties in accordance with section 91-9.5, Hawaii Revised Statutes, and shall be served on all persons or agencies admitted as a party at their last recorded addresses at least fifteen days before the hearing date. Further, the notice shall be published as provided by law at least once in a newspaper of general circulation within the state and within the county provided that matters of internal management shall not be subject to the publication requirement. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-9, 91-9.5)

§13-167-54 Parties. (a) The following persons or agencies shall be admitted as a party:

- (1) The petitioner shall be a party.
- (2) All government agencies whose jurisdiction includes the land or water in question may be admitted as parties upon timely application.
- (3) All persons within a hydrologic unit who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.
- (4) Other persons who can show a substantial interest in the matter may apply to be a party. The presiding officer or the commission may approve the application only if the applicant's participation will substantially assist the commission in its decision making.

(b) The presiding officer or the commission as provided by law may deny any application to be a party when it appears that:

- (1) The position of the applicant for participation is substantially the same as the position of a party already admitted to the proceedings; and
- (2) The admission of additional parties will not add substantially new information or the addition will render the proceedings inefficient and unmanageable.

(c) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter by filing a written application with the commission not later than ten days before the scheduled contested case hearing or at such earlier time as the commission may designate. Except for good cause shown, late filings shall not be permitted.

(e) The application to become a party shall contain the following:

- (1) The nature of applicant's statutory or other right.
- (2) The tax map key number of the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.

- (3) The effect of any decision in the proceeding on applicant's interest.
- (4) The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.
- (f) If relevant, the application shall also address:
 - (1) Other means available whereby applicant's interest may be protected.
 - (2) The extent the applicant's interest may be represented by existing parties.
 - (3) The extent the applicant's interest in the proceedings differs from that of the other parties.
 - (4) The extent the applicant's participation can assist in development of a complete record.
 - (5) The extent the applicant's participation will broaden the issue or delay the proceeding.
 - (6) How the applicant's intervention would serve the public interest.
 - (7) Any other information the commission may add or delete.
- (g) If any party opposes another person's application to be a party, the party may file objections for the record no later than ten days prior to the hearing.
- (h) All applications to be a party shall be acted upon as soon as practicable and shall be decided not later than the commencement of the contested case hearing.
- (i) A person whose petition to be admitted as a party has been denied may appeal that denial to the circuit court pursuant to section 91-14, Hawaii Revised Statutes. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-9, 91-9.5)

§13-167-55 Mediation; prehearing conferences; exchange of exhibits; briefs. (a) After the parties to a contested case hearing have been determined, the commission may appoint a mediator in accordance with these rules to seek a solution to the dispute.

(b) The presiding officer may hold, or cause to be held, pre-hearing conferences with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limiting the number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.

(c) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the

parties intend to rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §91-9)

§13-167-56 Conduct of hearing. (a) Contested case hearings shall be conducted in accordance with this subchapter, and chapter 91, HRS.

(b) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. The commission members may examine and cross-examine witnesses.

(c) The chairperson of the commission shall be the presiding officer. However, the chairperson may designate another commission member, an appointed representative, or a master to be presiding officer unless prohibited by law.

(d) The commission may conduct the hearing or, unless otherwise prohibited by law, the commission in its discretion may designate a hearing officer or master to conduct contested case hearings.

(e) The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript.

(f) In hearings on applications, petitions, complaints, and violations, the petitioner or complainant shall make the first opening statement and the last closing argument unless the commission directs otherwise. Other parties shall be heard in such order as the presiding officer directs. After all parties close their case, the department may make its recommendations, if any.

(g) Where a party is represented by more than one counsel, they may allocate witnesses between them but only one of the counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.

(h) Each party shall have the right to conduct such cross-examinations of the witnesses as may be required for a

full and true disclosure of the relevant facts and shall have the right to submit rebuttal evidence, subject to limitation by the presiding officer.

(i) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross examination, or the time for testimony upon a particular issue subject to law.

(j) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-9, 92-16)

§13-167-57 Procedure for witnesses. (a) Witnesses may be subpoenaed as set forth below:

- (1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the commission shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or a commission member may request the issuance of a subpoena.
- (2) Request for the issuance of subpoenas for the production of documents or records shall be in writing, shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. Only parties or a commission member may request the issuance of a subpoena duces tecum.

(b) Subpoenas may be issued by the presiding officer. No subpoena shall be issued unless the party requesting the subpoena has complied with this section giving the name and address of the desired witness and tendering the proper witness and mileage fees. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. Requests for subpoenas shall be filed not later than three days before the scheduled hearing.

(c) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii and such fees and mileage shall be paid by the party

at whose request the witness appears. [Eff. MAY 27, 1988]
(Auth: HRS §§91-2, 174C-8) (Imp: HRS §92-16)

§13-167-58 Motions. (a) All motions other than those made during a hearing shall be made in writing to the commission, shall state the relief sought, and shall be accompanied by an affidavit or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for all motions and opposing memorandum, if any.

(b) The moving party shall serve a copy of all motions on all other parties at least forty-eight hours prior to the hearing on the motion and shall file with the commission the original with proof of service.

(c) A memorandum in opposition or a counter affidavit shall be served on all parties not later than twenty-four hours prior to the hearing. The original and proof of service shall be filed with the commission.

(d) Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing shall be deemed a waiver of objection to the granting or denial of the motion. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8)
(Imp: HRS §91-7)

§13-167-59 Evidence. (a) The presiding officer may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view to doing substantial justice.

(b) The presiding officer shall rule on the admissibility of all evidence. The rulings may be reviewed by the commission in determining the matter on its merits.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval of the presiding officer, a witness may read testimony into the record on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer and all counsel parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that

substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the presiding officer five days before the hearing or if such prior service is waived, to permit proper cross examination of the witnesses on matters contained in the prepared testimony.

(f) If relevant and material matter is offered in evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other matter in the document would burden the record, at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies of it received as an exhibit. Other parties shall be afforded opportunity at the time to examine the document, and to offer in evidence other portions believed material and relevant.

(g) Exhibits shall be prepared as follows:

(1) Documents, pleadings, correspondence and other exhibits shall be legible and must be prepared on paper either 8-1/2 x 13 inches or 8-1/2 x 11 inches in size. Charts and other oversize exhibits must be bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.

(2) When exhibits are offered in evidence, the original and eight copies, unless otherwise waived by the commission, shall be furnished to the presiding officer for the commission's use with adequate copies for review by other parties, unless the copies have been previously furnished or the presiding officer directs otherwise.

(h) If any matter contained in a document on file as a public record with the department is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(i) Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts when parties are given notice

either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(j) At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-9, 91-10)

§13-167-60 Correction of transcript. Motions to correct the transcript shall be made within five days after receipt of the transcript and shall be acted upon by the presiding officer. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §91-10)

§13-167-61 Disqualification. No commission member shall sit in any proceeding in which the member has any pecuniary or business interest involved in the proceeding or who is related within the first degree by blood or marriage to any party to the proceeding. If, after declaring any pecuniary interest or consanguinity to the parties, the parties do not oppose the member from sitting in a proceeding, the record shall note clearly the waiver by the parties. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§84-14, 91-13)

§13-167-62 Ex-parte (single party) communications. (a) No party or person petitioning to be a party to a proceeding before the commission nor their employees, representatives, or agents shall make an unauthorized ex- parte communication either oral or written concerning the contested case to any member of the commission who will be a participant in the decision-making process.

(b) The following classes of ex-parte communications are permitted:

- (1) Those which relate solely to matters which a commission member is authorized by the commission to dispose of on ex-parte basis.
- (2) Requests for information with respect to the status of a proceeding.
- (3) Those which all parties to the proceeding agree or which the commission has formally ruled may be made on an ex-parte basis.
- (4) Those with representatives of any news media on matters intended to inform the general public.

[Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §91-13)

§13-167-63 Decisions and orders. (a) A proceeding shall be deemed submitted for decision by the commission after the taking of evidence, the filing of briefs, the consideration of motions, and the presentation of oral argument as may have been permitted or prescribed by the presiding officer. Where a hearing officer has conducted the hearing, the hearing officer shall file a report with the evidence, or a summary thereof, as well as proposed findings of facts and conclusions of law which the commission may adopt, reject, or modify. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposals shall be filed with the commission and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.

(b) Within ninety days after the hearing, the commission shall render its findings of fact, conclusions of law and decision and order approving the proposal, denying the proposal, or modifying the proposal by imposing conditions. The vote of each member shall be recorded. Upon agreement by the parties, the examination and proposed decision provisions under section 91-11, HRS, may be waived pursuant to section 91- 9(d), HRS.

(c) Every decision and order adverse to a party to the proceeding, rendered by the commission in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the commission shall incorporate in its decision a ruling upon each proposed findings so presented.

(d) Decisions and orders shall be served by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy. When a party to an application proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §91-12)

§13-167-64 Reconsideration. (a) The commission may reconsider a decision it has made on the merits only if the moving party can show:

- (1) New information not previously available would affect the result; or
- (2) That a substantial injustice would occur.
- (b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-11, 91-12)

§13-167-65 Appeals. (a) Parties to proceedings who are aggrieved by the decision of the commission may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of the evidence.

(b) Any other law to the contrary notwithstanding, including chapter 91, HRS, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 91-14, 174C-8) (Imp: HRS §§91-14, 91-15, 174C-60).

Subchapter 5

Special Proceedings

§13-167-81 Declaratory rulings. (a) On petition of an interested person or on its own motion, the commission may issue a declaratory order regarding the applicability of any statutory provision of the state water code, or of any rule or order of the commission thereunder, or any question of law, fact, or mixed question of law and fact within the jurisdiction of the commission. Petitions for the issuance thereof shall state clearly and concisely the controversy or uncertainty, shall cite the statutory authority involved, shall include a complete statement of the facts, reasons, or grounds prompting the petition together with full disclosure of petitioner's interest, and shall conform to the requirements of §13-167-25.

(b) The commission, upon receipt of the petition, may require the petitioner to file additional data or a memorandum of legal authorities in support of the position taken by the petitioner.

(c) The commission may, without notice or hearing, dismiss a petition for declaratory ruling which fails in any material respect to comply with the requirements of this section.

(d) After review of the information filed pursuant to this section the commission may order a hearing on the petition. Any petitioner or interested party who requests a hearing on the petition shall set forth in writing the reasons why the information filed will not permit a fair and expeditious disposition of the petition. If the request for hearing is dependent upon factual assertion, affidavits establishing those facts shall accompany the request. If a hearing is ordered by the commission, the proceeding shall be conducted in accordance with chapter 91, HRS. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-8, 92-16)

§13-167-82 Citizen complaints. If any person files a complaint with the commission that any other person is wasting or polluting water, or is making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring within or outside of a water management area, not expressly exempted under this code, without a permit where one is required, the commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof. All complaints related to water quality shall be filed directly with the department of health. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§92-17, 174C-13)

§13-167-83 Request for mediation. (a) The commission may employ mediation on its own motion or on the written petition of any government agency or affected party. Mediation may be applied in contested case hearings after parties to the proceedings have been determined. Mediation may also be used prior to the initiation of formal proceedings upon the agreement of affected persons.

(b) The party or agency requesting mediation must file a written petition with the commission.

(c) A petition requesting mediation shall contain concise statements of:

- (1) The legal authority under which the proceeding, hearing or action is to be held or made;
- (2) The petitioner's interest that may be affected;
- (3) The disagreement, denial, or grievance which the petitioner requests mediation thereof;
- (4) The basic facts and issues raised; and

- (5) The relief to which the party or petitioner seeks or deems itself entitled.
 - (d) The petition shall also make reference to the following:
 - (1) Nature of petitioner's statutory or other right;
 - (2) Nature and extent of the petitioner's interest, and if an abutting property owner, the tax map key description of the property;
 - (3) Effect of any decision of the commission on petitioner's interest;
 - (4) Other means available whereby petitioner's interest may be protected;
 - (5) Extent petitioner's interest may be represented by existing parties;
 - (6) Extent petitioner's interest in proceeding differs from that of the other parties; and
 - (7) Specifically identify any other person(s) who may or will be affected or impacted by the proposed relief which petitioners seek.
- [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-84 Position statements. Within thirty days after the filing of a petition for mediation any affected state or county agency (other than the commission or the division of water and land development) may file with the commission a statement of position with a summary of reasons in support or opposition, or in the alternative, a request for additional data upon which is necessary for a statement of position to be filed. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-85 Mediation. Upon receipt of an appropriate request, the commission may request petitioner and any affected persons identified as necessary to the resolution of the dispute to participate in mediation. All appropriate requests shall be consolidated in a single mediation conference. The commission shall not be a party to the mediation, and shall not be permitted to attend mediation conferences. The department of land and natural resources may be a party to the mediation if an appropriate request is made. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-86 Appointment of a mediator. Within fifteen days after the deadline for filing of the position statements

the commission shall appoint a qualified mediator from a list maintained by the commission for such purposes. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties to the mediation. Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent the prompt completion of the mediation. Upon receipt of such information, the chairperson shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event the parties are unable to agree as to whether the mediator shall serve, or in the event the appointed mediator becomes unable or unwilling to serve, the chairperson will appoint another mediator in accordance with the same process. The mediator shall not be an employee of any affected state or county agency or its staff. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-87 Mediation conference. The initial mediation session shall be held within 15 days after the appointment of the mediator. The mediator shall fix the time and place of each subsequent mediation session. The conference shall be held within the affected county unless all parties and the mediator agree otherwise. The mediation period shall not extend more than forty five days after the initial mediation session, except by order of the commission. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-88 Authority of mediator. The mediator shall attempt to help the parties reach a satisfactory resolution of their dispute, but shall not have authority to impose a settlement upon the parties. The mediator may conduct joint and separate meeting with the parties and make oral and written recommendations for settlement. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-89 Privacy. Mediation sessions shall be private. The parties and their representatives shall have the right to attend the joint mediation sessions. Other persons may attend only with the permission of all parties to the mediation and the consent of the mediator. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-90 Confidentiality. (a) Confidential information disclosed to a mediator by any party in the course of the mediation shall not be divulged by the mediator to anyone including other parties to the mediation. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any administrative proceedings or judicial forum.

(b) The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitrable, judicial, administrative, or other proceeding:

- (1) views expressed or suggestions made by any other party with respect to a possible settlement of any disputed issue;
- (2) statements or admissions made by any other party in the course of mediation proceedings;
- (3) proposals made or views expressed by the mediator; or
- (4) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

(c) There shall be no stenographic record or electronic recordation of the mediation process. [Eff. MAY 27, 1988]
(Auth: HRS §174C-8) (Imp: HRS §91-2)

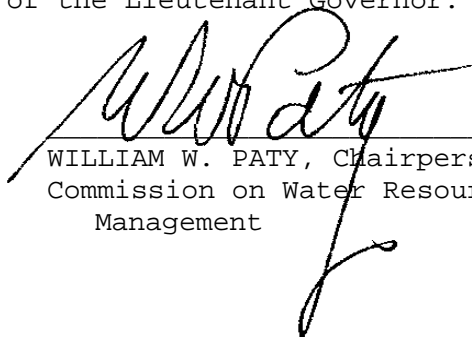
§13-167-91 Recommendation of mediator. The mediator shall submit a written report containing recommendations to the commission, based upon any mediation agreement reached between the parties or stating that no agreement was reached, for consideration by the commission in its final decision. The written report of the mediator shall be filed with the commission and served on all parties to the mediation within ten days of the close of the mediation conference. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

§13-167-92 Expenses. The parties shall each bear their respective costs, fees and expenses. The cost to administer the mediation, including any fees, required travel and other expenses of the mediator, shall be borne by the department. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §91-2)

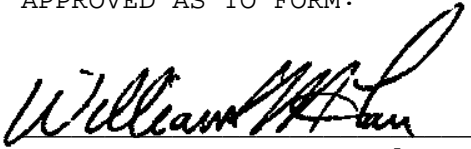
DEPARTMENT OF LAND AND NATURAL RESOURCES

Chapter 13-167, Hawaii Administrative Rules, on the Summary page dated April 20, 1988 was adopted on April 20, 1988; following public hearings held on Oahu on March 22, 1988; on Maui on March 17, 1988; on Molokai on March 21, 1988; on Kauai on March 23, 1988; and on Hawaii on March 15, 16, 1988; after public notice was given in the Honolulu Star Bulletin, Hawaii Tribune Herald, Maui News and the Garden Island on February 24, 1988 and March 8, 1988.

The adoption of chapter 13-167 shall take effect ten days after filing with the Office of the Lieutenant Governor.

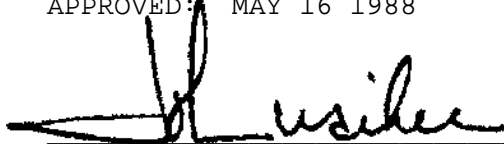

WILLIAM W. PATY, Chairperson
Commission on Water Resource
Management

APPROVED AS TO FORM:


Deputy Attorney General

Dated: 5/3/88

APPROVED: MAY 16 1988


JOHN WAIHEE, Governor
State of Hawaii

Date Filed